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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MICHAEL J. CONLON,

Plaintiff,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF
JUSTICE;
JOHN ASHCROFT, Attorney General;
FEDERAL BUREAU OF PRISONS;
NANCY BAILEY, Warden of FGI,
Safford, Arizona;
UNITED STATES PAROLE COMMISSION;
JOHN R. SIMPSON; U.S. Parole
Commissioner;
UNITED STATES PROBATION OFFICE;
KEVIN LOWRY, U.S. Probation
Officer;
PATRICK FOY, U.S. Probation
Officer;
THOMAS COLLINS, U.S. Probation
Officer;
JOHN LAWHEAD, U.S. Probation
Officer;
UNITED STATES SENTENCING
COMMISSION;

Defendants.

CV-N-01-700-DWH-VPC

MOTION TO DISMISS SECOND
AMENDED COMPLAINT OR, IN THE
ALTERNATIVE, FOR SUMMARY
JUDGMENT

BY
LANCE S. WILSON
CLERK
DEPUTY

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FILED

Come now each of the named defendants in this action,
individually and collectively, through their undersigned counsel,
and move this Court pursuant to Rule 7(b), Fed.R.Civ.P., for

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1 dismissal of this action or, in the alternative, for summary
2 judgment.

3 The motion to dismiss is made on the grounds that this Court
4 lacks subject matter jurisdiction as to the claims against
5 certain defendants, this Court lacks personal jurisdiction over
6 certain defendants, service of process has been insufficient as
7 to certain defendants, and the second amended complaint fails to
8 state a viable claim for relief against any of the named
9 defendants.

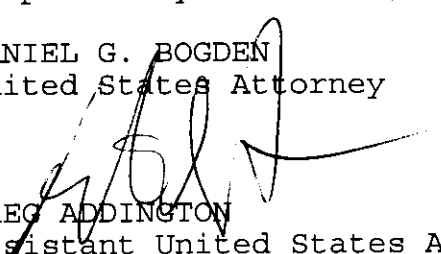
10 The alternative motion for summary judgment is made on the
11 grounds that plaintiff can prove no facts which would entitle him
12 to the relief requested against any of the named defendants.

13 This motion is based on the attached memorandum of law and
14 the Statement of Undisputed Material Facts (and corresponding
15 attachments), filed and served herewith. This motion is brought
16 pursuant to Rules 12(b)(1), (2), (5), and (6) and Rule 56,
17 Fed.R.Civ.P.

18 For the reasons described in the attached memorandum of law,
19 this action should be dismissed or, in the alternative, summary
20 judgment entered against plaintiff and in favor of each of the
21 defendants.

22 Respectfully submitted,

23 DANIEL G. BOGDEN
24 United States Attorney

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26 GREG ADDINGTON
27 Assistant United States Attorney
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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY

Plaintiff Conlon commenced this action by filing a complaint pro se on December 14, 2001. The complaint sought damages from multiple individual and institutional defendants, all of them having some affiliation with the federal government. The focus of Conlon's complaint was his "illegal" incarceration by federal authorities. Specifically, Conlon contended that he was entitled to damages on account of the erroneous effect given to Conlon's various parole violations. No summons was issued in connection with the complaint.

On March 19, 2002, Conlon (represented by counsel) filed his first amended complaint and obtained issuance of summonses directed to some of the defendants. By Notice (#5) issued April 18, 2002, this Court directed Conlon to demonstrate service of the summons and complaint or suffer dismissal of the action. In response, Conlon filed several summonses with information which purported to show effective service on some (but not all) of the defendants.¹

On May 24, 2002, this Court entered its Order (#13) dismissing this action as to defendants Thomas Collins, Patrick

¹ The summonses filed by Conlon (## 6-12) showed "service" by certified mail on the following defendants: 1) U.S. Sentencing Commission, 2) John Simpson (Parole Commissioner), 3) U.S. Parole Commission, 4) U.S. Bureau of Prisons, 5) U.S. Federal Judiciary, Probation Office, 6) Attorney General John Ashcroft, and 7) Nancy Bailey (former Warden of BOP facility).

1 Foy, John Lawhead, Kevin Lowery, and the United States of
2 America. The basis of the dismissal Order was Conlon's failure
3 to serve the summons and complaint within the time provided by
4 Rule 4(m), Fed.R.Civ.P. Conlon sought reconsideration of this
5 dismissal Order but Conlon's motion for reconsideration was
6 denied on July 23, 2002 (#18).

7 In the meantime, all of the defendants (including those
8 already dismissed by the May 24, 2002 Order) sought dismissal or
9 summary judgment through a motion (#15) which was supported by
10 declarations of the various individual defendants with personal
11 knowledge of Conlon's parole status. Among other things, the
12 motion sought dismissal on the grounds of insufficient service of
13 process, failure of the complaint to state a viable claim for
14 relief, and immunity enjoyed by the individual defendants. The
15 motion was opposed by Conlon. In addition to opposing the
16 motion, Conlon sought leave to file a second amended complaint
17 (#32), a motion which was granted by Order entered November 19,
18 2002 (#35). Accordingly, the second amended complaint was filed
19 on the same day (#42) - with the previously-filed dispositive
20 motion (#15) still pending. The Court solicited supplemental
21 memoranda from the parties regarding the pending dispositive
22 motion, with the parties submitting their respective supplemental
23 memoranda (## 36, 37).

24 By Order (#41) entered March 14, 2003, this Court denied the
25 motion (#15) to dismiss without prejudice. The Court concluded
26 that the filing of the second amended complaint had left the
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1 motion to dismiss the first amended complaint "moot." In the
2 same Order, the Court noted that Conlon had "not demonstrated
3 that the defendants have been properly served under Rule 4" and
4 specifically noted the time limits for such service under Rule
5 4(m), Fed.R.Civ.P. This Court directed Conlon to file proof of
6 timely and effective service of process within sixty days.

7 At the time of this Court's Order of March 14, 2003, no
8 summonses had been issued (or apparently requested) in connection
9 with the second amended complaint and no service of the second
10 amended complaint had been effected on any of the individual
11 defendants.² In response to the March 14, 2003, Order, Conlon
12 obtained issuance of eleven summonses (#43) on March 24, 2003.
13 Presumably, Conlon is now attempting service upon the various
14 individual defendants.

15 As discussed below, Conlon can not possibly obtain timely
16 and effective service of the summons and second amended
17 complaint, as directed by the Order (#41) of March 14, 2003,
18 because the time period for obtaining such service has expired
19 (and, in fact, expired prior to the issuance of the summonses on
20 the second amended complaint). Accordingly, this action should
21 be dismissed as to all of the individual defendants (and
22 dismissed for the second time as to defendants Collins, Foy,
23 Lawhead, and Lowery (see Order #13)).

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26 ² It is obvious that no service could possibly have been
27 effected prior to March 24, 2003 regarding the second amended
28 complaint since no summons was issued until that date (#43).

1 Additionally, dismissal is sought as to all individual
2 defendants on the grounds that the complaint fails to state a
3 viable claim for relief as to them and that they enjoy absolute
4 or qualified immunity from suit. Also, this Court lacks personal
5 jurisdiction as to defendant Nancy Bailey.³

6 In addition to the dismissal of the individual defendants on
7 various grounds, this motion seeks dismissal of the named
8 "institutional" defendants on multiple grounds. Specifically, it
9 is argued that the Federal Tort Claims Act (FTCA) claims are
10 barred by the statute of limitations, no other remaining claims
11 are viable against any of the remaining institutional defendants,
12 and this Court lacks subject matter jurisdiction over such non-
13 existent claims.

14 Alternatively, summary judgment is sought against Conlon
15 with respect to all claims alleged against all defendants,
16 individual and institutional. The original declarations of Kevin
17 Lowey, Pat Foy, Thomas Collins, Nancy Bailey, and Greg Addington
18 were previously submitted to the Court in connection with the
19 previous dispositive motion (#15). For the Court's convenience,
20 copies of those declarations are attached to the Statement of
21 Undisputed Material Facts, filed and served herewith.

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26 ³ These defendants must assert all of these grounds for
27 dismissal in this motion in order to avoid waiver of such
28 defenses under Rule 12(h), Fed.R.Civ.P.

1 II. INTRODUCTION

2 Conlon was sentenced to a term of imprisonment in 1986 for
3 narcotics offenses. He was paroled at various times and his
4 parole was revoked by the U.S. Parole Commission for parole
5 violations. During one of those paroles in late 1997 and early
6 1998, he was briefly supervised by U.S. Probation Officer Kevin
7 Lowry. That parole was revoked by the U.S. Parole Commission on
8 account of parole violations. He was again released on parole in
9 late 1999. The parole certificate in late 1999 directed Conlon
10 to report to the probation office in the Western District of
11 Texas within 72 hours. Conlon told his BOP case manager that he
12 (Conlon) wanted to report to the District of Nevada. Conlon did
13 not, however, report to either probation office (Texas or Nevada)
14 and, accordingly, a recommendation was made to the U.S. Parole
15 Commission to again revoke parole. A warrant of arrest was
16 issued and Conlon was eventually apprehended and returned to
17 custody. As matters progressed, Conlon initiated habeas corpus
18 proceedings in the District of Arizona (where he was
19 incarcerated), claiming that he had been incarcerated too long on
20 account of irregularities in the computation of his sentence
21 following parole revocation. Those proceedings resulted in the
22 August 27, 2001 Order which is attached to the complaint as
23 exhibit 1. The order directed that Conlon be released without
24 further parole no later than August 31, 2001.

25 Based on the allegations of the second amended complaint,
26 Conlon seeks recovery of damages against various defendants,
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1 asserting claims under the Federal Tort Claims Act (FTCA), as
2 well as under the Constitution (based on Bivens) and 42 U.S.C.,
3 section 1985.

4 The named defendants include six "institutional" defendants.
5 They are (1) the United States, (2) the U.S. Department of
6 Justice, (3) The Bureau of Prisons, (4) the U.S. Parole
7 Commission, (5) the U.S. Probation Office, and (6) the U.S.
8 Sentencing Commission. As discussed below, the United States is
9 the only proper party to an FTCA claim and the FTCA claim is
10 untimely and must be dismissed. The remaining institutional
11 defendants must be dismissed from all claims because no viable
12 claim is asserted as to such defendants.

13 Conlon also names seven "individual" defendants. They are
14 (1) Attorney General John Ashcroft, (2) Nancy Bailey (former
15 warden at the BOP Safford, Arizona facility), (3) John Simpson
16 (U.S. Parole Commissioner), and four U.S. Probation Officers
17 (Kevin Lowry, Pat Foy, Thomas Collins, and John Lawhead). As
18 discussed below, all of these defendants must be dismissed
19 because they enjoy absolute or qualified immunity from suit, this
20 Court lacks personal jurisdiction as to some of them, there has
21 been insufficient service of process as to all of them, and the
22 complaint fails to state a viable claim for relief as to any of
23 them.

24 To the extent any claims survive the motions for dismissal,
25 summary judgment is sought as to any remaining defendants on the
26 grounds that no viable claim can be maintained by Conlon based on
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1 the facts established through the attached declarations and
2 evidentiary materials.

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4 III. THE DEFENDANTS

5 The allegations of the second amended complaint betray a
6 fundamental misunderstanding of the roles which are played by the
7 various agencies in the computation of criminal sentences, the
8 decisions which are made concerning parole for "old law"
9 offenders, and the fixing of release dates for federal prisoners.
10 Because an understanding of these roles is important to an
11 understanding of each defendant's conduct, the following brief
12 discussion is provided regarding these agencies and their
13 functions.

14 The United States Parole Commission is a federal agency that
15 has jurisdiction, inter alia, over federal prisoners who
16 committed their offenses prior to November 1, 1987. Such
17 prisoners are referred to as "old law" federal prisoners in
18 contrast to "new law" federal prisoners who committed their
19 offenses after November 1, 1987, are sentenced under the
20 Sentencing Reform Act, are not eligible for parole, and are not
21 under the Commission's jurisdiction. See 18 USC, sections 4201-
22 4218; 28 CFR, sections 2.1-2.66.⁴ The parole Commission is made
23 up of Parole Commissioners who are appointed by the President and
24 approved by the Senate. The Commissioners make parole decisions

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27 ⁴ Sections 4201-4218 of Title 18, USC, have been repealed
but remain in effect for old law prisoners.

1 for the individuals under the Commission's jurisdiction. Those
2 decisions include decisions to grant or deny parole to prisoners,
3 to revoke the parole for parolees, and to revoke the mandatory
4 release of mandatory releasees. When the Parole Commission
5 denies a prisoner release on parole, the prisoner is released by
6 the Bureau of Prisons via mandatory release based on good time
7 credits. Mandatory releasees are under the Parole Commission's
8 jurisdiction upon their release as if they had been released on
9 parole; the only difference between a parolee and a mandatory
10 releasee is that the mandatory releasee's sentence terminates 180
11 days before his full term date (his "180-day date") unless his
12 mandatory release is revoked prior to that date. See 18 USC,
13 sections 4163-64. Only a Parole Commissioner (not a staff person
14 or a probation officer) has the authority to order a prisoner
15 released on parole, issue a warrant, or revoke parole or
16 mandatory release.

17 U.S. Probation Officers are employees of the federal
18 district court. However, they also work for the Parole
19 Commission when they supervise parolees, special parolees, and
20 mandatory releasees who are under the Commission's jurisdiction.
21 U.S. Probation Officers are responsible for reporting to the
22 Commission and making recommendations to the Commission.

23 The Bureau of Prisons is the federal agency that is charged
24 with housing federal inmates and computing their release dates.
25 The computation of an old law prisoner's release date is first
26 based on the judgment and commitment order but may also be
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1 affected by subsequent orders of the Parole Commission revoking
2 the person's parole and/or ordering forfeited certain period of
3 time spent on parole.

4 If the Parole Commission revokes the parole of a parolee or
5 the mandatory release of a mandatory releasee and orders the
6 individual to serve a term of incarceration, he is returned to
7 the Bureau of Prisons to serve the term. The Bureau of Prisons
8 does not make the revocation decision; rather, it houses the
9 revoked parolee or mandatory releasee for the period of time
10 ordered by the Commission and it recalculates the person's
11 release date based on the Parole Commission's order (which is
12 called a "Notice of Action").

13 The U.S. Sentencing Commission was created by the Sentencing
14 Reform Act in 1984. The Sentencing Commission is an independent
15 federal agency in the judicial branch of government. It is
16 comprised of seven voting members who are appointed by the
17 President and confirmed by the Senate. The Sentencing
18 Commission's duties include developing guidelines for sentencing
19 in federal courts, collecting data about crime and sentencing,
20 and serving as a resource to Congress, the Executive Branch, and
21 the Judiciary on crime and sentencing policy. The Sentencing
22 Commission does not compute the sentences of individual federal
23 offenders.

24 Defendant John Ashcroft is the Attorney General of the
25 United States. Other than being named in the caption of the
26 complaint and identified in paragraph 3 of the complaint, he is
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1 nowhere mentioned in the complaint and no factual allegations are
2 made against him.

3 Defendant John Simpson is a U.S. Parole Commissioner. Other
4 than being named in the caption of the complaint and identified
5 in paragraph 9 of the complaint, he is nowhere mentioned in the
6 complaint and there are no factual allegations made against him.

7 Defendant Nancy Bailey is the former warden of the Safford,
8 Arizona corrections facility which housed Conlon during his
9 federal custody. It appears as though the Fifth Claim for Relief
10 (False Imprisonment) and Sixth Claim for Relief (Cruel and
11 Unusual Imprisonment) are specifically directed against defendant
12 Bailey.

13 Defendants Lowry, Foy, Collins, and Lawhead are U.S.
14 Probation Officers (Lawhead is now retired) in Nevada. Their
15 respective roles in the supervision of Conlon's parole are
16 described in the declarations attached hereto. It should be
17 noted that, as to defendant Collins, he is named in the caption
18 of the complaint and identified in paragraph 6 of the complaint.
19 He is referred to again in paragraph 79 with a conclusory
20 allegation that he "conspired" with others to violate Conlon's
21 Constitutional rights. He is nowhere else mentioned in the
22 complaint and there are no factual allegations made against him.

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24 IV. STATEMENT OF FACTS

25 See Statement of Undisputed Materials Facts, filed and
26 served herewith.

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2 V. ARGUMENT

3 A. This Action Should Be Dismissed on Multiple Grounds.

4 i. The Institutional Defendants Are Improper Parties To An
Action Under the Constitution or Under 42 USC, Section 1985.

5 Conlon brings his action against these defendants under 42
6 USC, section 1985(3) as well as various provisions of the U.S.
7 Constitution. It is well settled, however, that section 1985, by
8 its own terms, imposes liability only upon "persons" as that term
9 is defined. Federal agencies are not "persons" as that term is
10 used in section 1985. See Monell v. Dept. of Social Services,
11 436 U.S. 658 (1978) (holding that only local governmental agencies
12 are "persons" within the meaning of section 1983).

13 Likewise, these federal institutional defendants may not be
14 sued under section 1985 or under the Constitutional theories of
15 tort liability because a federal agency may not be sued in its
16 own name unless Congress has specifically authorized such suit in
17 legislation containing explicit authorizing language. See
18 Blackmar v. Guerre, 342 U.S. 512 (1952) (government agency may not
19 be sued eo nomine without explicit authorizing statute).

20 A suit for damages against a federal agency (and against a
21 federal official in his or her official capacity) is essentially
22 a suit against the United States. See Brandon v. Holt, 469 U.S.
23 464, 471-73 (1985); Lehner v. United States, 685 F.2d 1187, 1189
24 (9th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); Gilbert v.
25 DaGorssa, 756 F.2d 1455, 1458 (9th Cir. 1985); Daly-Murphy, 837
26 F.2d at 355. The United States, as sovereign, is immune from
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1 suit except as it consents to be sued. See Lehman v. Nakshian,
2 453 U.S. 156, 160 (1981). Thus, a damages claim against a
3 federal agency (or a federal official in his or her official
4 capacity) must be dismissed on the ground of sovereign immunity
5 if the United States has not consented to be sued for damages
6 regarding the claim. See Ross v. United States, 574 F. Supp.
7 536, 540-41 (S.D.N.Y. 1983); Safeway Portland Employees' Federal
8 Credit Union v. FDIC, 506 F.2d 1213 (9th Cir. 1974). In this
9 instance, Conlon has explicitly based some of his damages claims
10 on the Constitution and on a statute which does not impose
11 liability on federal agencies.

12 Constitutional tort actions are not maintainable against the
13 United States and thus are not maintainable against federal
14 agencies. See Jaffee v. United States, 592 F.2d 712, 717 (3d
15 Cir. 1979) (FTCA does not authorize suits against the United
16 States based on a constitutional tort theory); Boda v. United
17 States, 698 F.2d 1174, 1176 (11th Cir. 1983) (constitutional torts
18 are barred by sovereign immunity, and the court lacks
19 jurisdiction to consider such a claim). Thus, neither the United
20 States nor its agencies is subject to suits based on
21 constitutional tort. See Daly-Murphy, 820 F.2d at 1478;
22 Arnsberg v. United States, 757 F.2d 971, 980 (9th Cir. 1985),
23 cert. denied, 475 U.S. 1010 (1986) (Bivens does not provide a
24 means of cutting through the sovereign immunity of the United
25 States). Therefore, insofar as Conlon's claims against the
26 institutional defendants are construed (as they are plainly
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1 alleged) to be a constitutional cause of action, the suit is
2 barred by sovereign immunity and must be dismissed as to them.

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4 ii. Other than Against the United States, no FTCA Claim May Be
5 Maintained Against Any of the Defendants.

6 Sovereign immunity bars all suits against the United States
7 and its agencies/employees except in accordance with the explicit
8 terms of the statutory waiver of such immunity. Cox v. Secretary
9 of Labor, 739 Supp. 28, 30 (D.D.C. 1990); Kline v. Republic of El
10 Salvador, 603 F.Supp. 1313, 1316 (D.D.C. 1985); see also United
11 States v. Testan, 424 U.S. 392, 399 (1976); United States v.
12 Mitchell, 445 U.S. 535, 538 (1980). The FTCA, 28 U.S.C.,
13 sections 2671-ff, specifically sets forth the exclusive judicial
14 remedy provided to persons who are damaged by tortious conduct
15 committed by federal employees or agencies, together with the
16 conditions under which the remedy may be invoked. 28 U.S.C.,
17 section 2679(b).

18 One such condition is contained in 28 U.S.C., section
19 2679(a), which provides that only the United States is a proper
20 defendant to such a suit, not individual federal agencies or
21 employees. Section 2679(b)(1) specifically provides that "[a]ny
22 other civil action ... against the employee or the employee's
23 estate is precluded..." It is thus clear that, under the FTCA,
24 only the United States is a proper defendant to a suit for money
25 damages and no damages action can be maintained against the
26 particular federal agency or federal employee. 28 U.S.C.,
27 section 2679(a) and (b). Allen v. Veteran's Administration, 749

1 F.2d 1386, 1388 (9th Cir. 1984) ("The Federal Tort Claims Act
2 provides that the United States is the sole party which may be
3 sued for personal injuries arising out of the negligence of its
4 employees. 28 U.S.C., sections 1346(b), 2679(a). Individual
5 agencies may not be sued."); Galvin v. OSHA, 860 F.2d 181, 183
6 (5th Cir. 1988) ("an FTCA claim against a federal agency or
7 employer as opposed to the United States itself must be dismissed
8 for want of jurisdiction"); Stewart v. United States, 655 F.2d
9 741 (7th Cir. 1981) (dismissing FTCA action brought against U.S.
10 Postal Service and postal employee driver); Hagmeyer v.
11 Department of Treasury, 647 F.Supp. 1300, 1304-05
12 (D.D.C.) (dismissing FTCA claim against the Department of the
13 Treasury); Cox v. Secretary of Labor, 739 F.Supp. at 29 (suit
14 against the secretary of Labor rather than the government itself
15 must be dismissed for lack of subject matter jurisdiction). See
16 also Cooper v. U.S. Postal Service, 740 F.2d 714 (9th Cir. 1984);
17 Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1188
18 (9th Cir. 1998). "[T]he courts have consistently held that an
19 agency or government employee can not be sued eo nomine under the
20 Federal Tort Claims Act." Galvin v. OSHA, 860 F.2d at 183.

21 Here, Conlon explicitly states that he is alleging (among
22 other things) an FTCA cause of action. The United States is the
23 only proper defendant in such an action and all other defendants
24 (institutional and individual) must be dismissed from the FTCA
25 claims. See Gregory v. Mitchell, 634 F.2d 199 (5th Cir. 1981).

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1 iii. The FTCA Action Against the United States is Untimely.

2 Conlon specifically invokes the Court's jurisdiction for his
3 claims against the United States (as a discrete defendant) under
4 the Federal Tort Claims Act (FTCA). It is the defendants'
5 position that the United States is the only proper defendant in
6 this entire action and that all other defendants must be
7 dismissed. The FTCA claim against the United States, however, is
8 untimely and must be dismissed. The FTCA claim is untimely
9 because Conlon did not file a timely administrative tort claim, a
10 jurisdictional prerequisite under the FTCA.

11 Conlon claims that he was falsely arrested, based on an
12 improper calculation of his parole status, in February 1998 and
13 was thereafter imprisoned unlawfully. See Second Amended
14 Complaint, paras. 20-23. Plaintiff has attached to his second
15 amended complaint (as exhibit A) various letters acknowledging
16 receipt of administrative tort claims submitted by plaintiff in
17 July 2001. Any FTCA action based on those administrative tort
18 claims would be barred because the claims are untimely.

19 There is a two-year limitations period for submission of the
20 required administrative claim under the FTCA. 28 USC, section
21 2401(b); Davis v. United States, 642 F.2d 328, 330 (9th Cir.
22 1981), *cert. denied*, 455 U.S. 919 (1982). The date on which a
23 claim accrues is determined by federal law. Washington v. United
24 States, 769 F.2d 1436, 1438 (9th Cir. 1985). Here, the alleged
25 tort (false arrest) occurred in February 1998 and his damages
26 began to accumulate on that date. All of his alleged damages
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1 arise from the single event (arrest) which occurred in February
2 1998. Accordingly, the administrative claims filed in July 2001
3 were untimely and can not provide the jurisdictional basis for an
4 FTCA cause of action.

5 Conlon may attempt to salvage his proposed FTCA claim by
6 arguing that he was subjected to a continuing tort which
7 effectively tolled the statute of limitations until he was
8 released from prison. Such an argument would fail. For a
9 continuing violation to be established, there must be a series of
10 tortious acts one or more of which falls within the limitations
11 period. Western Center for Journalism v. Cederquist, 235 F.3d
12 1153, 1157 (9th Cir. 2000). A continuing violation is occasioned
13 by continual unlawful acts rather than by the continual ill
14 effects from an original violation. Ward v. Caulk, 650 F.2d 1144
15 (9th Cir. 1981). Assuming that a tort was committed in February
16 1998 (or earlier) when plaintiff was arrested, the tort was
17 completed at that time and plaintiff was required to submit an
18 administrative claim within two years thereafter in order to
19 support a viable FTCA claim.

20 In Sandutch v. Muroski, 684 F.2d 252 (3rd Cir. 1982), the
21 Third Circuit rejected the notion that a continuing incarceration
22 was a continuing tort. In the absence of allegations of unlawful
23 acts while incarcerated, the continuing incarceration was simply
24 the continuing ill effects from the initial tortious conduct
25 which resulted in the incarceration. Id. at 254. The same result
26 was reached in Maslauskas v. United States, 583 F.Supp. 349
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(D.Mass. 1984) (FTCA suit untimely based on negligence of Parole Commission-incarceration was not continuing violation).

Accordingly, the FTCA claim against the United States must be dismissed for lack of subject matter jurisdiction.

iv. Defendants Simpson, Lawhead, Lowry, Foy, and Collins Should Be Dismissed Based on Absolute Immunity.

Conlon sues defendants Simpson, Lawhead, Lowry, Foy, and Collins in both their individual and official capacities. They may properly claim immunity from suit in their individual capacities for their actions.

First, the Court lacks subject-matter jurisdiction over defendants Simpson, Lawhead, Lowry, Foy, and Collins because they may properly claim absolute immunity from suit for their actions. In order to protect them from harassment and to allow them to perform their duties, government officials are entitled to claim an appropriate form of immunity from suits for damages. See Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982). Parole officials, including Regional Commissioners, are absolutely immune from suit for their decision-making. See Fendler v. U.S. Parole Com'n, 774 F.2d 975, 979-80 (9th Cir. 1985); Walrath v. United States, 35 F.3d 277 (7th Cir. 1994); Anderson v. Boyd, 714 F.2d 906 (9th Cir. 1983); Sellars v. Procunier, 641 F.2d 1295, 1298 (9th Cir. 1981), cert. denied, 454 U.S. 1102 (1981); Walker v. Prisoner Review Board, 769 F.2d 396, 398 (7th Cir. 1985), cert. denied, 474 U.S. 1065 (1986). This firmly established immunity is based upon the quasi-judicial nature of parole decisions and the threat

1 that retaliatory suits will undermine independent decision-
2 making. Like judges, parole officials must,

3 render impartial decisions in cases and
4 controversies that excite strong feelings
because the litigant's liberty is at stake.
5 *** Just as the decision-making process of
judges must be kept free from fear, so must
6 that of parole board officials. Without this
protection, there is the same danger that the
7 decision-maker might not impartially
adjudicate the often difficult cases that
8 come before them.

9 Sellars, 641 F.2d at 1303. Thus, U.S. Parole Commissioner John
10 R. Simpson is absolutely immune from suit for his actions of
11 issuing warrants and revoking parole and mandatory release terms.

12 Other parole officials who participate in quasi-judicial
13 functions are also entitled to absolute immunity from suit. See
14 Cleavinger v. Saxner, 474 U.S. 193, 204 (1985); Fry v.
15 Malaragno, 939 F.2d 832, 837 (9th Cir. 1991); Sellars, 641 F.2d
16 at 1295; Anderson, 714 F.2d at 908-09 (parole officials are
17 entitled to absolute quasi-judicial immunity for the execution of
18 parole revocation proceedings). Thus, absolute immunity is not
19 limited to the parole decision-makers, but extends to the staff
20 employees who assist the Commissioners in their responsibilities.
21 See Cleavinger, 474 U.S. at 200 ("With this judicial immunity
22 firmly established, the Court has extended absolute immunity to
23 certain others who perform functions closely associated with the
24 judicial process. The federal hearing examiner and administrative
25 law judge have been afforded absolute immunity."); Allison v.
26 California Adult Authority, 419 F.2d 822, 823 (9th Cir. 1969).

1 It is immaterial whether the act complained of occurred before,
2 during, or after a parole hearing. What matters for immunity
3 purposes is that the act is "entwined with the exercise ... of
4 quasi-judicial power." Anderson, 714 F.2d at 909.

5 Defendants Lawhead, Lowry, Foy, and Collins are (or were)
6 U.S. Probation Officers. Their recommendations to the U.S. Parole
7 Commission are an intricate part of the parole adjudicatory
8 process. On that basis, they are entitled to absolute immunity
9 for their alleged actions of submitting a violation report and
10 request for a warrant to the Parole Commission in 1998 and
11 notifying the Commission in 2000 of petitioner's failure to
12 report for supervision. Federal probation officers are entitled
13 to absolute immunity for quasi-prosecutorial functions of
14 initiating parole revocation proceedings, which are an intricate
15 part of the parole adjudicatory process. See Briscoe v. LaHue,
16 460 U.S. 325, 335 (1983) (police officer testifying in a criminal
17 trial granted absolute immunity); Imbler v. Pachtman, 424 U.S.
18 409 (1976); Fry, 939 F.2d at 836-37 (actions of IRS attorneys in
19 initiating a prosecution and prosecuting plaintiffs was
20 intimately connected to the judicial process, and therefore suit
21 on those actions was barred by absolute immunity); Thompson v.
22 Duke, 882 F.2d 1180, 1184-85 (7th Cir. 1989); Meyers v. Contra
23 Costa Dep't of Social Services, 812 F.2d 1154 (9th Cir. 1987);
24 Johnson v. Kelsh, 664 F.Supp. 162 (S.D.N.Y. 1987) (parole officer
25 who initiates revocation process entitled to absolute immunity
26
27
28

1 because role is comparable to that of a prosecutor in a criminal
2 trial).

3 Thus, because their alleged actions of submitting a
4 violation report and request for a warrant to the Parole
5 Commission in 1998 and for notifying the Commission in 2000 of
6 petitioner's failure to report for supervision were "entwined
7 with the exercise ... of quasi-judicial power," defendants
8 Lawhead, Lowry, Foy, and Collins are also entitled to absolute
9 immunity from suit. Anderson, 714 F.2d at 909.

10 Accordingly, defendants Simpson, Lawhead, Foy, Collins, and
11 Lowry must be dismissed from this action for lack of subject
12 matter jurisdiction and failure to state a claim against for
13 which relief may be granted.

14
15 v. Defendants Lawhead, Foy, Simpson, Collins, Lowry, and Bailey
Should Be Dismissed on the Grounds of Qualified Immunity.

16 In any event, if they are not entitled to absolute immunity,
17 defendants Simpson, Lawhead, Lowry, Foy, and Collins are entitled
18 to qualified immunity, pursuant to Anderson v. Creighton, 483
19 U.S. 635 (1987); Davis v. Scherer, 468 U.S. 183, 191 (1984), and
20 Harlow, 457 U.S. at 806; Siegert v. Gilley, 111 S.Ct. 1789
21 (1991); Gomez v. Toledo, 446 U.S. 635 (1960)). Likewise, Nancy
22 Bailey (former warden of the BOP facility in Safford, Arizona) is
23 entitled to qualified immunity.

24 Qualified immunity, pursuant to the Supreme Court's decision
25 in Harlow, 457 U.S. 800, permits federal employees to be subject
26 to suit for actions taken in the course of their employment only
27

1 if their conduct violates "clearly established statutory or
2 constitutional rights of which a reasonable person would have
3 known." 457 U.S. at 818. See Anderson, 483 U.S. at 639-40;
4 Capoeman v. Reed, 754 F.2d 1512 (9th Cir. 1985) (discussing
5 "clearly established" requirement). Whether an official
6 protected by qualified immunity may be held personally liable for
7 an alleged unlawful official action generally turns on the
8 "objective legal reasonableness" of the official's action.
9 Anderson, 483 U.S. at 639. An official is entitled to prompt
10 dismissal based on this defense if the complaint fails to plead a
11 violation of established law. See Harlow, 457 U.S. at 818;
12 Mitchell v. Forsyth, 472 U.S. 511 (1985); Fendler, 774 F.2d at
13 980; Arnsberg, 757 F.2d at 981.

14 If the Court concludes that defendants Simpson, Lawhead,
15 Lowry, Foy, and Collins are not entitled to absolute immunity for
16 their alleged actions (as discussed in section iv, above), they
17 certainly are entitled to qualified immunity (as is defendant
18 Bailey). All of their alleged actions were taken in the course
19 of their federal employment and their actions did not violate any
20 clearly established constitutional or statutory right of which a
21 reasonable person would have known. See Fendler, 774 F.2d at
22 980. It is plain from the face of plaintiff's second amended
23 complaint that the actions of these individual defendants were
24 taken in their official capacities as a U.S. Parole Commissioner,
25 U.S. Probation Officers, or as a federal prison warden.
26 Therefore, they can be deprived of the defense of qualified
27
28

1 immunity only if the complaint alleges facts that, if true, would
2 constitute a clear invasion of a constitutional or statutory
3 right secured to federal parolees. See Mitchell, 472 U.S. at
4 528.

5 In this case, the conduct of defendants Simpson, Lawhead,
6 Lowry, Foy, and Collins did not violate clearly established
7 statutory or constitutional rights of which a reasonable person
8 would have known. Even assuming that the reports given to the
9 Parole Commission by the U.S. Probation Office were erroneous,
10 Conlon has no constitutional protection against having an
11 erroneous report filed with the Parole Commission by his U.S.
12 Probation Officer. Even if his 2000 special parole certificate
13 listed the Western District of Texas as his district of
14 supervision, petitioner has no constitutional protection against
15 having the District of Nevada (where he had told the Bureau of
16 Prisons he intended to go) notify the Parole Commission that he
17 had failed to report for supervision in either the Western
18 District of Texas or the District of Nevada. A U.S. Probation
19 Officer is obliged to report to the Commission. See 28 C.F.R. §
20 2.42. The Constitution only provides protection at the stage of
21 a hearing if such a report results in the parolee's arrest as a
22 parole violator. See Morrissey v. Brewer, 408 U.S. 471 (1971).
23 A constitutional violation occurs if an arrested parolee receives
24 no hearing to contest the truth of the report that caused his
25 arrest. Conlon does not claim that he was not given a revocation
26 hearing after he was taken into custody in 1998 under the Parole
27
28

1 Commission's warrant. The record shows that Conlon was provided
2 with a preliminary interview and a parole revocation hearing in
3 1998 (Exhibits 6 & 7), and that he was provided with due process
4 before, at, and after the hearing. See 18 U.S.C. § 4214 (setting
5 out due process rights for parole revocation) and § 4215
6 (administrative appeal right). He was also given a preliminary
7 interview in 2000 (Exhibit 18), prior to his release by Judge
8 Browning's court order (Exhibit 20).

9 It is apparent, as well, that the Bureau of Prisons
10 correctly computed Conlon's sentence and release date based on
11 the orders and rulings of the U.S. Parole Commission, as BOP is
12 required to do.⁵

13 Accordingly, there is no "established law" which these
14 defendants may be said to have violated. See Fendler, 774 F.2d
15 at 980 (plaintiff "has not alleged a violation of a clearly
16 established constitutional right."). Since these defendants can
17 be deprived of the defense of qualified immunity only if the
18 complaint alleges facts that, if true, would constitute a clear
19 invasion of a constitutional or statutory right secured to
20 federal parolees in existing case law, they are entitled to the
21 prompt dismissal or entry of summary judgment in this case. See
22 Harlow, 457 U.S. 800; Schultz v. Sundberg, 759 F.2d 714, 717-18
23 (9th Cir. 1985) (the decision in Harlow "was motivated by a

24
25 ⁵ It should also be noted that defendant Bailey does not
26 personally compute inmate sentences and release dates (and did not
27 compute Conlon's). As discussed below, she can not be held
28 personally liable for damages on account of the errors of her
subordinates (if there were any such errors).

1 | desire to allow for more expeditious disposition of suits against
2 | government officials on summary judgment.").

3 |
4 | vi. The Claims Against Defendants Lawhead, Collins, and Bailey
5 | Must Be Dismissed For failure to State a Claim.

6 | Conlon's claim against defendants Lawhead, Collins, and
7 | Bailey should be dismissed for failure to state a claim under
8 | Rule 12(b)(6) .

9 | Neither Collins, Lawhead, nor Bailey had any direct role or
10 | participation in Conlon's parole, incarceration, or sentencing
11 | computation. Each of them functioned as supervisors in their
12 | respective organizations and are being sued for the alleged mis-
13 | conduct of their subordinates. Conlon must allege and prove that
14 | these defendants personally participated in or directed the
15 | alleged unconstitutional actions of which he complains. See
16 | Watts v. Morgan, 572 F. Supp. 1385, 1392 (N.D. Ill. 1983) (claim
17 | of constitutional injury based on a theory of vicarious liability
18 | not actionable under § 1983). These supervisory defendants may
19 | not be held vicariously liable for the action of their
20 | subordinates. See Terrell v. Brewer, 935 F.2d 1015, 1018 (9th
21 | Cir. 1991); Boettger v. Moore, 483 F.2d 86, 87 (9th Cir.
22 | 1973) (higher government officials are not liable under the
23 | doctrine of respondeat superior for lower officials because both
24 | are employees of the government, and higher officials are not the
25 | employers of the lower officials); Adams v. Pate, 445 F.2d 105,
26 | 107 (7th Cir. 1971) (respondeat superior inapplicable where money
27 | damages are sought). See Rizzo v. Goode, 423 U.S. 362 (1976);

1 Sportique Fashions, Inc. v. Sullivan, 597 F.2d 664, 666 (9th Cir.
2 1979); Kulow v. Nix, 28 F.3d 855 (8th Cir. 1994).

3 Therefore, to the extent that Conlon's claims against these
4 defendants is based on the doctrine of respondeat superior, they
5 should be dismissed for failure to state a claim.

6
7 vii. Conlon Has Failed to State a Claim Against Defendants
8 Simpson, Ashcroft, and Collins.

9 Conlon has also failed to state a claim against defendants
10 Simpson, Ashcroft, and Collins because he does not make any
11 specific allegations regarding what unlawful actions were taken
12 by any of these defendants. Damage actions against government
13 officials are subject to a heightened pleading standard, and,
14 under that standard, Conlon has failed to state a claim against
15 these defendants. Even without a heightened pleading standard,
16 the complaint is utterly silent regarding any conduct personally
17 undertaken by these defendants against Conlon. See Siegert, 111
18 S.Ct at 1793 (plaintiff failed "to establish the violation of any
19 constitutional right at all."); Smith, 807 F.2d at 200 ("Bare
20 allegations of improper purpose . . . do not suffice to drag
21 officials into the mire of discovery.").

22 As to defendant Simpson, he is identified in the caption of
23 the complaint and (correctly) identified as a U.S. Parole
24 Commissioner in paragraph 9 of the complaint. His name appears
25 nowhere else in the complaint.

26 As to defendant Ashcroft, he is identified in the caption of
27 the complaint and (correctly) identified as the United States
28

1 Attorney General in paragraph 3 of the complaint. His name
2 appears nowhere else in the complaint.⁶

3 As to defendant Collins, he is identified in the caption of
4 the complaint and (correctly) identified as a U.S. Probation
5 Officer in paragraph 6 of the complaint. There is a conclusory
6 allegation at paragraph 79 that he "conspired" with others to
7 deprive Conlon of various Constitutional rights (with no
8 description of what Collins allegedly did in furtherance of this
9 conspiracy). His name appears nowhere else in the complaint.

10 Since there are no claims stated against these defendants,
11 they must be dismissed.

12
13 viii. Conlon's claims against all individual defendants should
14 be dismissed for his failure to serve them with the summons and
complaint.

15 A federal court must obtain personal jurisdiction over the
16 defendant before it can issue a binding judgment in a suit where
17 plaintiff seeks money damages from the defendant. In the absence
18 of technically correct service of process, the court has no
19 jurisdiction to render a personal judgment. Moskovits v. DEA,
20 774 F.Supp. 649 (D.D.C. 1991). Actual notice by the defendant is
21 not sufficient and does not substitute for compliance with the
22 personal service requirement in accordance with the applicable
23 rule. Moskovits, id.; DeFazio v. Delta Air Lines, 849 F.Supp. 98
24 (D.Mass. 1994).

25 _____
26 ⁶ It is rather unlikely that John Ashcroft would have had
27 any direct involvement in Conlon's parole status from 1997
through 2000. At that time, Ashcroft was a U.S. Senator.

1 The requirement of personal service is no less firm in so-
 2 called Bivens actions brought against federal employees for
 3 Constitutional torts.⁷ In order to maintain such an action,
 4 which seeks recovery of money damages from the individual
 5 employee's personal assets, proper service must be effected on
 6 the defendant employee. Daly-Murphy v. Winston, 837 F.2d 348, 355
 7 (9th Cir. 1987) ("failure to effect individual service is fatal to
 8 a Bivens action"); Despain v. Salt Lake Area Gang Unit, 13 F.3d
 9 1436 (10th Cir. 1994); Tajeddini v. Gluch, 942 F.Supp. 772
 10 (D.Conn. 1996); Huskey v. Quinlan, 785 F.Supp. 4 (D.D.C.
 11 1992) (dismissing Bivens case for failing to serve defendant).

12 A federal court may only use those methods of service
 13 authorized by rule or statute. Omni Capital International Ltd. v.
 14 Rudolff Wolff & Co., 484 U.S. 97, 104-08 91987). In the present
 15 context, the provisions of Rule 4, Fed.R.Civ.P., describe the
 16 required service of process which must be effected.

17 Prior to the 2000 amendments to Rule 4, there was
 18 substantial disagreement among the Circuit Courts concerning the
 19 issue of whether institutional service on the United States (in
 20 addition to individual service on the individual defendant) was
 21 required in Bivens actions against individual federal employees.
 22 See Vaccaro v. Dobre, 81 F.3d 854 (9th Cir. 1996) (not required);

24 ⁷ To state a Bivens claim, a plaintiff must allege
 25 facts showing that a person acting under color of
 26 federal law deprived the plaintiff of a right,
 27 privilege, or immunity secured by the U.S.
 28 Constitution. Bivens v. Six Unknown Named Agents, 403
 U.S. 388, 397 (1981).

1 Armstrong v. Sears, 33 F.3d 182 (2d Cir. 1994) (not required);
2 Light v. Wolf, 816 F.2d 746 (D.C.Cir. 1987) (required);
3 Ecclesiastical Order of Ism of Am v. Chasin, 845 F.2d 113 (6th
4 Cir. 1988) (required). The 2000 amendments to Rule 4 put this
5 issue to rest by adding Rule 4(i)(2)(B), specifically addressing
6 the service requirement in suits against federal employees sued
7 in their individual capacities for acts or omissions occurring in
8 connection with their official duties. The rule makes plain that
9 service upon the individual is required (by means specified) and
10 service upon the United States is required. See Advisory
11 Committee Notes, Rule 4 (2000 amendments).

12 Service upon the United States is effected by (1) delivery
13 of the summons and complaint to the U.S. Attorney or designated
14 official in the U.S. Attorney's Office or by mailing a copy of
15 the summons and complaint by certified/registered mail to the
16 U.S. Attorney's Office addressed to the "civil process clerk" and
17 (2) mailing a copy of the summons and complaint by
18 certified/registered mail to the Attorney General in Washington,
19 D.C. See Rule 4(i)(1).

20 In addition to the delivery of the summons and complaint as
21 set forth above, service upon the defendants must be timely. In
22 this Court's Order (#41) of March 14, 2003, Conlon was directed
23 to file proof of timely service as required under Rule 4(m),
24 Fed.R.Civ.P. Conlon can not do so because the time period for
25 effective service of the second amended complaint has expired
26
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1 (and, in fact, expired before any summons was issued on the
2 second amended complaint).

3 In 1983, in view of a host of cases which were sitting
4 unserved and moribund on various court dockets, Rule 4 of the
5 Federal Rules of Civil procedure was amended to motivate
6 plaintiffs to secure timely service of their actions. Rule 4(m)
7 provides that a complaint must be served, in the absence of good
8 cause otherwise shown, within 120 days of the filing of the
9 complaint.

10 "[Rule 4(m)] sets 120 days as a presumption of unreasonable
11 and dilatory delay in service of the complaint in any civil
12 suit." Amella v. United States, 732 F.2d 711, 713 (9th Cir.
13 1984). "The rule is intended to force parties and their
14 attorneys to be diligent in prosecuting their causes of action."
15 Wei v. State of Hawaii, 763 F.2d 370, 372 (9th Cir. 1985). See
16 also Whale v. United States, 792 F.2d 951 (9th Cir. 1986); United
17 States ex. rel. Deloss v. Kenner General, 764 F.2d 707 (9th Cir.
18 1985); Reynolds v. United States, 782 F.2d 837 (9th Cir. 1986).
19 These cases reflect the insistence that Rule 4(m) be utilized to
20 vindicate the interests which the rule was designed to protect.

21 Conlon's second amended complaint was filed on November 19,
22 2002. The 120-day period of time for effecting timely service
23 expired on March 19, 2003. No summons was issued on the second
24 amended complaint until March 24, 2003. It is, therefore,
25 impossible for Conlon to have effected timely and effective
26 service on any of the individual defendants within the time
27
28

1 provided by Rule 4(m). Accordingly, this action should be
2 dismissed as to each of them (as was already done as to some of
3 them by this Court's Order (#13) entered May 24, 2002).⁸

4 ix. This Court lacks personal jurisdiction over Simpson and
5 Bailey.

6 Defendant U.S. Parole Commissioner John R. Simpson resides
7 in the State of Maryland. The Court lacks personal jurisdiction
8 over him, insofar as he is sued in his individual capacity. He
9 is not a resident of the State of Nevada, he performs no work in
10 the State of Nevada, and the Court does not have jurisdiction
11 over him just because he is a U.S. government employee. See
12 Stafford v. Briggs, 444 U.S. 527, 544-45 (1980). Therefore,
13 defendant Simpson should be dismissed from this action in his
14 individual capacity.

15 Likewise, the Court lacks personal jurisdiction over
16 defendant Nancy Bailey. She resides in the State of New Jersey,
17 performs no work in Nevada, and did not commit any act which
18 would create jurisdiction in the state of Nevada.

19 As to defendants Simpson and Bailey, the second amended
20 complaint should be dismissed for lack of personal jurisdiction.

21
22 x. Conlon has failed to state a claim under 42 U.S.C. § 1985.

23 Conlon has also failed to state a claim under 42 U.S.C. §
24

25 ⁸ It would seem unlikely that Conlon would be able to
26 show "good cause" for his failure to timely serve the second
27 amended complaint when he has previously suffered a Rule 4(m)
dismissal with respect to his first amended complaint.

1 1985(3) (as he alleges), because he has not shown invidious
2 class-based discrimination by any of the named defendants. In
3 enacting section 1985, which prohibits conspiracies to deprive
4 individuals of their civil rights, Congress did not intend to
5 create a general federal tort law, i.e., an all-purpose cause of
6 action to sue for any conspiracy to violate Conlon's legal
7 rights. To state a claim under this section, Conlon must show
8 some racial, or otherwise class-based invidiously discriminatory
9 animus. See Burns v. County of King, 883 F.2d 819 (9th Cir.
10 1989); Bretz v. Kelman, 773 F.2d 1026, 1028-30 (9th Cir. 1985);
11 Harrison v. Springdale Water and Sewer Com'n, 780 F.2d 1422,
12 1429-30 (8th Cir. 1986). Consequently, Conlon's claim under 42
13 U.S.C. § 1985 must be dismissed, pursuant to Rule 12(b)(6), for
14 failure to state a claim.

15
16 B. Summary Judgment Should Be Entered in Favor of the
17 Defendants.

18 Under Rule 56(c), Fed.R.Civ.P., summary judgment is proper
19 where the "pleadings, depositions, answers to interrogatories,
20 and admissions on file, together with the affidavits, if any,
21 show that there is no genuine issue as to any material fact and
22 that the moving party is entitled to a judgment as a matter of
23 law." The moving party has the burden of demonstrating the
24 absence of a genuine issue of fact for trial. Anderson v. Liberty
25 Lobby, Inc., 477 U.S. 242, 256 (1986). If the moving party
26 satisfies the burden, the party opposing the motion must set
27
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1 forth specific facts showing that there remains a genuine issue
2 for trial. Rule 56(e), Fed.R.Civ.P.

3 A non-moving party who bears the burden of proof at trial to
4 an element essential to his case (such as plaintiff herein) must
5 make a showing sufficient to establish a genuine dispute of fact
6 with respect to the existence of that element of the case or be
7 subject to summary judgment. Celotex Corp. v. Catrett, 477 U.S.
8 317, 322 (1986). Such an issue of fact is a genuine issue if it
9 reasonably can be resolved in favor of either party. Anderson,
10 477 U.S. at 250-51. Mere disagreement or the bald assertion that
11 a genuine issue of material fact exists does not preclude the
12 entry of summary judgment. Harper v. Wallingford, 877 F.2d 728
13 (9th Cir. 1989); Famous Brands v. David Sherman Corp., 814 F.2d
14 517, 522 (8th Cir. 1987).

15 The undisputed material facts of this case are that Conlon's
16 incarceration was the result of decisions by the U.S. Parole
17 Commission and a legitimate good-faith legal dispute concerning
18 the computation of his release date. There is no basis for
19 imposition of damages against any these named defendants because
20 the allegations of negligence, discriminatory intent, intentional
21 denial of civil rights, and conspiracy to deny Conlon's civil
22 rights can not be sustained.

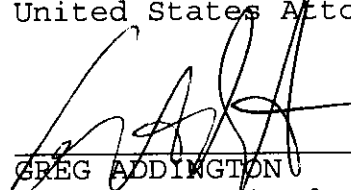
23 Accordingly, to the extent any claims survive the motion to
24 dismiss analyses above, summary judgment should be entered in
25 favor of the defendants and against plaintiff.
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1 V. CONCLUSION

2 Based on the foregoing, this action should be dismissed with
3 prejudice or, in the alternative, summary judgment should be
4 entered in favor of the defendants and against plaintiff.

5
6 Respectfully submitted,

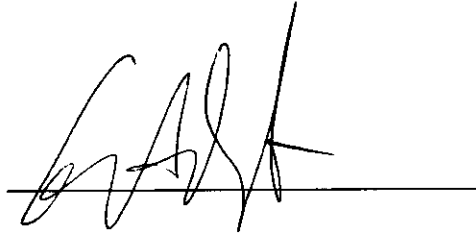
7 DANIEL G. BOGDEN
8 United States Attorney

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11 GREG ADDINGTON
12 Assistant United States Attorney
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing MOTION TO DISMISS
SECOND AMENDED COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY
JUDGMENT was mailed by first-class mail, postage pre-paid, on
April 8, 2003:

Wm. Patterson Cashill
410 California Avenue
Reno, NV 89509

A handwritten signature in black ink, appearing to read 'W. Patterson Cashill', is written over a horizontal line.